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Supreme Court of the United States

OCTOBER TERM, 1948

No. 408

GEORGE ABRAHAM,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, George Abraham, prays for issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit, in affirming, on October 13, 1948, the verdict of conviction of petitioner of January 16, 1948, and sentence on January 27, 1948, in the United States District Court for the Eastern District of Michigan, Southern Division.

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

This involves a petition for a writ of certiorari to review a decision of the Court of Appeals for the Sixth Circuit, affirming a judgment of the District Court in a prosecution for using the mails to promote frauds under Title 18, section 338, United States Code (now Title 18, United States Code, section 1341), which reads:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting to do so, place, or cause to be placed, any letter, * * * in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, * * * shall be fined not more than $1,000.00, or imprisoned not more than five years, or both."

Notice of appeal and assignments of error were filed (R. 53) claiming error in the trial in that (a) no scheme to defraud and use of the mails therefor was established, (b) there was a failure of proof of petitioner having any relation to the alleged scheme and use of the mails, (c) use of the mails was established solely by evidence of matter having been received through the mails, without proof that petitioner mailed or caused to be mailed the matter in question, and, (d) the verdict was against the great weight of the evidence.

The question was raised on the trial as to the sufficiency of the proofs by a motion for judgment of acquittal (R.

45-7), which was denied by the trial court (R. 47), and by objections to the admissibility of certain evidence. The objections fall into two classes. First, to evidence concerning receipts of matter through the mails. And secondly, testimony regarding the publication of the Daily Ad News and the operation of the A & L Advertising Agency, from which the mailed matter purportedly came, without first having established a scheme to defraud, and the connection of petitioner therewith.

The petitioner on the trial relied upon the authority of decisions in the Courts of Appeals for four Circuits. The trial court adopted a contrary view of the law. The appellate court, in affirming the judgment of conviction without opinion, leaves open the question of the applicability of one or the other of two divergent rules, one of which petitioner believes sustains his view of the proper applicable law of the case. The rule relied on, that of the second, third, eighth and tenth circuits, is the majority rule, as opposed to the rule announced by the seventh and ninth circuits. This petition is further grounded upon the question of what constitutes sufficient proof of a scheme to defraud and use of the mails in execution thereof within the meaning of Title 18, United States Code, section 338 (now Title 18, United States Code, section 1341).

II.

JURISDICTION TO REVIEW THE JUDGMENT

Jurisdiction to review the judgment and to issue a writ of certiorari therefor to the United States Court of Appeals for the Sixth Circuit is conferred on this Court by Title 28, United States Code, section 1254, as follows:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

This case involves a prosecution under Title 18, United States Code, section 338 (now Title 18, United States Code, section 1341), using mails to promote frauds, heretofore cited in substance. Petitioner was convicted and sentenced in the trial court (R. 47-9), which sentence was affirmed on appeal by the United States Court of Appeals for the Sixth Circuit on October 13, 1948, without opinion (R. 55).

III.

QUESTIONS PRESENTED

1. Did the proofs fail to establish the existence of any scheme to defraud and the use of the mails in execution thereof, or the causing of the mails to be used for such purposes?

> Petitioner contends the answer is "yes."
> Respondent contends the answer is "no."
> Both courts below answered "no."

2. May proof of the use of the mail, or the causing of the mails to be used, in furtherance of an alleged scheme to defraud be established solely by an inference drawn from the fact that an invoice was received through the mail by another person, bearing no signature but purporting to bear the printed name and street address of petitioner's trade name, without proof that petitioner ever conducted any business under that name and with no proof of mailing of the invoice by any person whatsoever, and without proof of the custom and practice with respect to mailing by the office of the alleged sender?

Petitioner contends that answer is "no."
Respondent contends the answer is "yes."
Both courts below answered "yes."

3. Since the evidence on the essential element of the offense charged was wholly circumstantial, did the prosecution sufficiently overcome the presumption as to petitioner's innocence so that there was no error in denying his motion for judgment of acquittal?

Petitioner contends that answer is "no."
Respondent contends the answer is "yes."
Both courts below answered "yes."

IV.

REASONS FOR ALLOWANCE OF THE WRIT

1. A conflict exists between the rules of law as announced in the decisions of the Courts of Appeal of the second, third, eighth and tenth Circuits, notably as laid down in *U. S. v. Baker,* (2 Cir.) 50 F. (2) 122, 123; *Whealton v. U. S.,* (3 Cir.) 113 F. (2) 710, 713; *Barrett v. U. S.,* (8 Cir.) 33 F. (2) 115-116; and *Rosenberg v. U. S.,* (10 Cir.) 120 F. (2) 935, 937, and the opinion of the Court below supported by some decisions of the seventh and ninth Circuits as in *U. S. v. Pike,* (7 Cir.) 158 F. (2) 46, and *Ross v. U. S.,* (9 Cir.) 103 F. (2) 600. This conflict and divergency is impossible of reconciliation to such an extent that there presently exists two diametrically opposed separate rules of law by which to determine what constitutes proof of the use of the mails or the causing of the mails to be used, as prohibited by Title 18, United States Code, Section 338 (now Title 18, United States Code, section 1341).

2. The conflict of authorities as to the applicable rules to be utilized in determining the sufficiency of the proof making out the use of the mails or the causing of their use as forbidden by Title 18, United States Code, section 338 (now Title 18, United States Code, section 1341), has not been settled by any decision of this Court upon the disputed points and thus there are left open important questions of the proper administration of the federal laws as to what does or does not constitute a violation of the statute.

3. The Court of Appeals for the Sixth Circuit has misapplied the rules announced in *U. S. v. Ross*, 92 U. S. 381, prohibiting the establishing of facts necessary to be proved by indulging in the pyramiding of an inference upon an inference, in lieu of requiring the proof of circumstances or other facts which will meet the requirements of the statute.

4. The final determination of the presently existing differences of opinions of the Courts of Appeal of the seven Circuits is a matter of vital importance to the proper administration of federal criminal procedure, in order that an equitable rule shall be applied in all cases involving such questions irrespective of the circuit in which it may arise.

PRAYER

Wherefore, petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this Court a full anl complete transcript of the record and proceedings of said cause, numbered and entitled in its docket No. 10,637, George Abraham v. United States of America, to the end that said cause may be reviewed and determined by this court, and that the judgment of the United States Court of Appeals for the Sixth Circuit be reversed, and for such further relief as this court may deem proper.

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Supreme Court of the United States

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No.....

GEORGE ABRAHAM,
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Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

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II.

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III.

OPINIONS OF THE COURTS BELOW

The proceedings in the District Court of the United States for the Eastern District of Michigan, Southern Di-

vision were docketed as Criminal Case Number 29,562. The verdict of the jury, filed January 16, 1948 (R. 47-8) and the judgment and sentence, filed January 27, 1948 (R. 48-9), were not reported.

The appeal to the United States Court of Appeals for the Sixth Circuit was docketed as case number 10,637, and the opinion affirming the conviction, filed October 13, 1948 (R. 55), has not been reported.

IV.

GROUNDS FOR JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254, which provides as follows:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Petitioner was convicted under Title 18, United States Code, section 338 (now Title 18, United States Code, section 1341), using mails to promote frauds, the applicable portions of which are set forth *supra* in the petition for writ of certiorari. The conviction and sentence of the trial court (R. 47-9) was affirmed on appeal to the United States Court of Appeals for the Sixth Circuit (R. 55).

V.

STATEMENT OF THE CASE

Petitioner, George Abraham, together with his wife, Loretta Abraham, was indicted (R. 1) on November 14, 1947, in the District Court of the United States for the

Eastern District of Michigan, Southern Division, for violation of Title 18, United States Code, section 338, (now Title 18, United States Code, section 1341) using mails to promote frauds, the applicable portions of which are set forth *supra,* in the petition for writ of certiorari.

Upon the arraignment the defendants plead not guilty (R. 3). Trial was commenced on January 13, 1948, and the jury on January 16, 1948, found the defendants guilty on all counts (R. 47). A motion for judgment of acquittal had previously been denied (R. 45-7). On January 27, 1948 petitioner was sentenced to imprisonment for a period of four years by the Honorable Arthur F. Lederle, United States District Judge (R. 48).

Notice of appeal was filed January 30, 1948 (R. 49), the assignments of error (R. 53) being (a) that no scheme to defraud and use of the mails therefor was established, (b) that there was a failure of proof as to petitioner having any relation to the alleged scheme and use of the mails, (c) that it was error to permit proof of use of the mails to be established solely by evidence of matter having been received through the mails when there was no proof that petitioner mailed or caused the same to be mailed, and (d) that the verdict was against the great weight of the evidence.

The issues presented to this Court under the headings "Questions Presented" and "Specification of Assigned Errors" are the same as those submitted to the Court of Appeals for the Sixth Circuit, which affirmed the conviction, without opinion, on October 13, 1948 (R. 55).

The indictment (R. 1), in four counts, charged the petitioner and Loretta Abraham with having devised and intended to devise a scheme to defraud business persons and firms in and about the City of Detroit, Michigan, and to

obtain money and property by falsely and fraudulently pretending and representing that the persons and firms had contracted for advertising through the A & L Advertising Agency, for insertion of want ads in a paper entitled the Daily Ad News. Further, that the petitioner and Loretta Abraham knowingly caused various letters, containing statements billing the addressees for advertising, to be delivered by the United States mail to the several named places of business for the purpose of executing the alleged scheme and artifice.

The following is a resumé of the evidence pertaining to petitioner.

Petitioner registered with the Wayne County Clerk, Detroit, Michigan for the purpose of conducting business under the assumed names of Daily Ad News and A & L Advertising Agency (R. 4).

He, accompanied by his wife, Loretta Abraham, inquired as to the availability of space in the Lawyers Building, 139 Cadillac Square, Detroit, Michigan, and subsequently petitioner leased one of the offices (R. 4-6). Petitioner stated that he was going to operate an advertising agency.

Petitioner and his wife were seen on the premises by the building manager on only a couple of occasions (R. 5-6). An unidentified party was seen there more often (R. 6).

Tenancy was terminated December 31, 1947.

An employee of the telephone company testified concerning the installation of phones at the office and the records of long distance calls (R. 7-10). Objection was made to the introduction of the telephone company records (R. 7), on the ground that they had not been connected with the defendants, which was overruled. Six phones were installed, and the application recited that they were for the business

of the A & L Advertising Agency and the Daily Ad News (R. 8). A number of long distance calls were made to Cleveland, but there were no toll calls to any of the business places who received bills for advertising (R. 8).

Two bank accounts were opened by petitioner and his wife in the names of the A & L Advertising Agency and the Daily Ad News (R. 11-13). Only Loretta Abraham was authorized to sign. Objection to introduction of this evidence was overruled (R. 11-12).

Petitioner, in August, 1947, contacted the Abbe Press, Inc., Detroit, and ordered printed about one thousand copies of the Daily Ad News (R. 13-17 and 34-36). He furnished the copy in the usual manner (R. 14 and 36). The paper contained only ads and was of the tabloid type (R. 15 and 35). An ad was identified as being for one of the companies whose employee testified to having received bills for advertising which they did not order (R. 17). The papers bore no dates but had the days of the week thereon, and the same number of copies were ordered for each of seven days of the week (R. 14-15). The bill was sent to the A & L Advertising Company; and the printers were paid by check, but the check was not produced (R. 17). There was no other testimony concerning publication of the Daily Ad News at any other times.

A mail carrier saw Mrs. Abraham almost daily in the offices in the Lawyers Building and also saw Kenneth Abraham, but never saw petitioner on the premises (R. 42-44).

With respect to Count I, neither of the representatives of Thompson Products Co., usually placing advertising claimed to have authorized any ads in the Daily Ad News, for which they were billed (R. 18 and 33). The invoice indicated that the advertising had been sold to Thompson Products by Mr. King and that the personnel manager of

Thompson Products had ordered the advertising run by the Daily Ad News. Through a stamp on the invoice, the witness claimed to know that the invoice had been received through the mail on or about August 28, 1947. The stamp was the one Thompson Products usually placed on incoming mail. The invoice bore no signature and no proof was offered as to the identity of the sender of the invoice (R. 18). The witness also identified two other invoices purporting to be from the A & L Advertising Agency. They were the same in all respects as the so-called indictment letter (R. 19).

As to Count II, the testimony was that Northern Engineering Works received through the mails, on or about August 28, 1947, an invoice for advertising bearing the printed name "A & L Advertising Agency" (R. 22-24). This invoice indicated that the advertising had been ordered by Miss Cuney, whose name appeared on the invoice, and that a salesman by the name of Gregg had sold the advertising. The witness denied knowing Mr. Gregg or having placed an order for the advertising. She further claimed that the stamp placed on the back of the invoice indicated to her that it had been received by the Northern Engineering Works through the United States mail (R. 22). She did not know petitioner and had never seen him.

Regarding Count III (R. 25-9), it was shown that the Allied Plumbing and Heating Supply Company of Wayne, Michigan, was the recipient of an invoice bearing the name "A & L Advertising Agency" on or about September 5, 1947. Their business manager identified the indictment letter as having been received through the mail (R. 25). It was a statement for advertising bearing the legend "A & L Advertising Agency," and recited that the advertising had been ordered by Mr. Gautreaux, who was the witness for the Government, and that it had been sold to the wit-

ness by Mr. Clark. The witness denied placing that particular advertising. He subsequently stated that while he did not place that advertising, he was not in a position to state that he had not authorized it, and therefore, he had paid the invoice with the company's check. The check bore on the back a rubber stamp endorsement of the A & L Advertising Agency, which was not identified. Objection to its admission was overruled (R. 26). Two additional invoices, not referred to in the indictment, were received by the Allied Plumbing and Heating Supply Company, one of which was paid, and one was not. The witness admitted that advertising had been solicited from him over the telephone by other agencies whose names he did not remember (R. 26 and 27). He was not acquainted with the petitioner.

With respect to Count IV, the so-called indictment letter was likewise an invoice bearing the name of the A & L Advertising Agency and was received by the Horst Manufacturing Company of Belleville, Michigan (R. 29-31). It was identified as having been received through the mail. The witness denied that he had placed the advertising covered by the invoice (R. 30). The invoice itself indicated that the advertising had been ordered by the witness, who was Mr. Underdown, then testifying. The invoice further indicated that the advertising had been sold to Mr. Underdown by a Mr. Hall. Mr. Underdown admitted that his name was correctly spelled on the invoice and that he was unable to remember the name and the identity of every person that called him on the telephone (R. 31). He did not know petitioner (R. 30).

In addition to the several indictment letters other testimony was offered of so-called similar acts. First, that of a restaurant owner of Howell, Michigan, who produced an invoice bearing the legend "A & L Advertising Agen-

cy" (R. 31-3). The witness testified that it had been received by him in the mail and requested payment for advertising run on behalf of the restaurant. The witness denied placing the advertising (R. 32). He admitted that during the period covered by the invoice his wife had placed advertising for the restaurant but he did not know where (R. 33).

Testimony was offered with respect to receipt of a similar invoice by the Huron Grey Iron Foundry in Ypsilanti (R. 37-9). They too had received an invoice purportedly from the A & L Advertising Agency requesting payment for advertising run on behalf of the company. It was identified also as having been received through the mails. The witness was unable to recall placing the advertising but admitted that he had been contacted by various people seeking business (R. 37). Further that he had been advertising, on or about the time covered by the invoice, that he was desperate for help, and had advertised extensively (R. 38). He also admitted that he had paid the invoice even though he did not remember placing the advertisement. He paid it because there was a doubt in his mind whether or not he had ordered the advertising (R. 39). The invoice was paid by their check which bore the rubber stamp endorsement of the A & L Advertising Agency. The stamp was not identified. An objection to the admission thereof was overruled (R. 39).

The next testimony of so-called similar acts was that offered by Motor State Products Company of Ypsilanti, who also had received an invoice requesting payment for advertising which invoice bore the legend "A & L Advertising Agency". The witness on behalf of the company denied placing such advertising (R. 40).

No proofs were offered to show that petitioner had ever spent one day in the operation of the business or had ever solicited any advertising or prepared or caused the preparation of any of the statements or bills in question, or had mailed or caused the mailing thereof. No showing was made that such invoices were ever used or possessed by petitioner nor did they bear his signature or writing. No attempt was made to show that petitioner knew or should have known that the advertising was not authorized. In fact the proofs showed his absence from the City of Detroit during most of the period involved (R. 10), and that an unidentified man was frequently seen at the office during the time it was rented by the Agency (R. 6). No effort was made to establish the custom and practice of the handling of the mail at the office of the company or even of the conduct of the general business at the office of either the Daily Ad News or the A & L Advertising Agency.

It is the contention of petitioner that the essential elements of the statute were not proven, and that his conviction is based upon the predication of inferences upon inferences which themselves are not supported by the facts.

In regard to the alleged scheme to defraud, there was inferred from the evidence concerning the receipt through the mails of the bills for advertising and the relation of petitioner to the A & L Advertising Agency and the Daily Ad News, that a scheme to defraud existed to which petitioner was a party. That inference is superimposed upon a series of three others: (1) that the purpose of the business was fraudulent, (2) that petitioner dominated the affairs of the Agency, from which it was further inferred (3) that therefore he must have known that the ads for which the bills were sent were not authorized.

Thus there is a series of four superimposed inferences, none of which the facts support.

Concerning the use of the mails, the sole evidence was that the bills for advertising, as described above, were received through the mails. The jury must have combined that evidence with the testimony concerning the relation of petitioner to the A & L Advertising Agency and the Daily Ad News, and drawn the inference that petitioner used, or caused the use of, the mails.

It is the contention of petitioner that a conviction under this statute cannot, as a matter of elementary and fair criminal procedure, or under the authorities, be based upon inferences drawn from such disconnected facts and tenuous proofs. There were insufficient acts shown or facts proven concerning the use or causing the use of the mails to justify the inference.

The ultimate conclusion on this element of the offense is likewise based upon a series of dependent inferences which are unsupported by the facts. It was first assumed that the statements received through the mails came from the A & L Advertising Agency, from which the further inference was drawn that petitioner mailed or caused the mailing of the statements, and that presumption is in turn dependent on another: that he dominated the affairs of the agency.

Finally this series of inferences was combined with the series concerning the scheme to defraud element to arrive at the ultimate conclusion that the mails were used or caused to be used by petitioner in furtherance of a scheme to defraud.

It is the contention of petitioner that his conviction is founded upon those unsupported inferences and their pyramiding in the described fashion, and that the judgments of the courts below should be reversed.

VI.

SPECIFICATION OF ASSIGNED ERRORS

1. Did the proofs fail to establish the existence of any scheme to defraud and the use of the mails in execution thereof, or the causing of the mails to be used for such purposes?

Petitioner contends the answer is "yes."
Respondent contends the answer is, "no."
Both courts below answered, "no."

2. May proof of the use of the mails, or the causing of the mails to be used, in furtherance of an alleged scheme to defraud be established solely by an inference drawn from the fact that an invoice was received through the mail by another person, bearing no signature but purporting to bear the printed name and street address of petitioner's trade name, without proof that petitioner ever conducted any business under that name and with no proof of mailing of the invoice by any person whatsoever, and without proof of the custom and practice with respect to mailing by the office of the alleged sender?

Petitioner contends the answer is, "no."
Respondent contends the answer is, "yes."
Both courts below answered, "yes."

3. Since the evidence on the essential element of the offense charged was wholly circumstantial, did the prosecution sufficiently overcome the presumption as to petitioner's innocence so that there was no error in denying petitioner's motion for judgment of acquittal?

Petitioner contends that answer is, "no."
Respondent contends the answer is, "yes."
Both courts below answered, "yes."

VII.

SUMMARY AND ARGUMENT

A. SUMMARY

Petitioner was convicted under Title 18, United States Code, section 338 (now Title 18, United States Code, section 1341) using the mails to promote frauds, the applicable portions of which are set forth *supra*, in the petition for writ of certiorari.

Petitioner contends that proof of the two basic elements of the case against him, (a) a scheme to defraud, and (b) use or causing the use of the mails in furtherance thereof, was only made out in the trial court, and subsequently affirmed in the Court of Appeals, by confusing or ignoring the rule against the predication of inference upon inference.

It must be, and is, admitted that no direct proof was offered tending to or establishing that the petitioner was ever connected with the actual operation of either the A & L Advertising Agency or the Daily Ad News, other than that he originally made plans to open such business and that he ordered one publication of the paper. An assumption that he was dominant in the affairs of the Agency can be based only on those meager facts.

We are next required to predicate thereupon, or to indulge in a second inference or presumption, that he used or caused the use of the mails to transmit the invoices, statements or bills in question. (This indulgence is required because the record is barren of any testimony as to who mailed or caused the mailing of the items in question.) The only proof of the mailing was that of receipt of such items by several persons.

Even this reasoning is only to be tolerated by including in the first inference, a further unwarranted assumption that the business of the A & L Agency and the Daily Ad News were nefarious or fraudulent at their conception; otherwise no scheme to defraud can be shown.

Further, that the courts below followed the minority rule among the Courts of Appeals regarding the degree of proof and type of evidence required to sustain a conviction for using the mails to promote frauds. There was no evidence in the case regarding acts or of custom and practice of mailing or of any other nature from which it could be inferred that petitioner used the mails or caused their use.

This Court is requested to resolve that conflict among the circuits, to establish the nature and degree of proofs required to sustain a conviction under the statute, and to determine whether or not the courts below misapplied the rule forbidding convictions to be based upon pyramided inferences drawn from circumstantial evidence.

B. ARGUMENT

Assigned Error Number One

The proofs did not establish that petitioner was a party to the alleged scheme to defraud and used or caused the use of the mails in furtherance thereof.

Assigned Error Number Three

Since the evidence on the essential elements of the offense was wholly circumstantial, the presumption of petitioner's innocence was not overcome, and it was error to deny the motion for judgment of acquittal.

Since the discussion of these two questions involves the same set of facts, they are considered together in this argument.

It is axiomatic that to sustain a conviction under Title 18, United States Code, section 338 (now Title 18, United States Code, section 1341), using mails to promote frauds, there must first be established that a scheme to defraud had been devised and existed at the time the mails were used or caused to be used. *Beck v. U. S.*, (8 Cir.) 33 F. (2) 107; *U. S. v. Buckner*, (2 Cir.) 108 F. (2) 921.

Analysis should be first directed to the evidence that was presented and relied upon as proof of the existence of a scheme. Next, that evidence should be considered together with the testimony relied upon as establishing the use of the mails or causing of their use in execution of the alleged scheme.

(a) Evidence relied on as proof of a scheme.

Out of 300 different advertisements for help wanted, that appeared in the paper, Daily Ad News, (Government Exhibit 14 (R. 17)), only seven places of business disputed or denied placing advertising for which they were subsequently billed. No claim is made that the ads were not published. The business is one in which anyone is entitled to engage.

Of the seven firms allegedly billed or receiving invoices for unauthorized advertising, the representatives of but three, Thompson Products Co., Eager Restaurant and Motor State Products, were positive in their testimony that they had not ordered the advertising (R. 19, 31, 41). Only one of these (Thompson Products Company), was named in the indictment.

The representatives of two others, Allied Plumbing and Heating Supply Co. and Huron Grey Iron Company, were so uncertain in their recollection of the events surrounding the advertising or as to their having authorized such advertising that upon receipt of the statements or invoices they were ordered to be paid (R. 26 and 39).

The representatives of the remaining two, Northern Engineering Works and Horst Manufacturing Co., denied placing the ads but the witnesses admitted that they were the persons who normally placed advertising, and that the invoices for advertising which they received bore their names as the persons who had ordered the advertising (R. 24 and 31).

All of the statements or invoices received by the several representatives showed the names of the salesmen who allegedly sold the advertising in question.

None of the witnesses identified petitioner as having ever approached them either in solicitation of the business or to demand or request payment therefor.

The Government's own exhibits, the telephone toll tickets, established that during August to October of 1947 petitioner was either called at Cleveland, Ohio or called therefrom. These are the months during which the alleged mailings took place (R. 9-10).

Not one dollar of the proceeds of the several checks sent in payment of the invoices (R. 27 and 37) which were received in evidence over objection of the petitioner, although deposited in the account of the A & L Advertising Agency, was shown ever to have been received by petitioner or to have been used by him in any way whatsoever.

The claims of the Government in the courts below that the A & L Advertising Agency existed only as the as-

sumed name of petitioner and that no office personnel or salesmen were employed is refuted by the proofs. The office was occupied daily by two known persons, Kenneth Abraham (R. 6 and 43) and Mrs. Loretta Abraham (R. 43). Six telephones were installed and used (R. 7). The space rented was 750 square feet (R. 5). It seems quite apparent from the last two facts that just two persons would hardly need three phones or 375 square feet of floor space apiece. In addition thereto, petitioner himself was never seen at the office by the mail carrier who called there four times daily (R. 44).

Obviously, the claim of the Government is without any foundation in fact whatsoever, and its falsity is clearly established by the facts.

Another inference was sought to be drawn by the Government from the fact that petitioner requested the insertion of the disputed ads, together with approximately 300 others, at the time the printing of the paper was ordered (R. 13), from which it was inferred that he therefore knew they were not authorized. Even this claim is refuted by the testimony, for the advertisements, as has been hereinbefore shown, carried the names of the proper persons to be contacted at the several places of business. The orders themselves bore the names of the persons authorizing their insertion (R. 24, 26, 31). These were not common names, easily spelled. To all intents and purposes, their appearance was wholly regular. Not a single fact can be pointed out which shows that petitioner knew the orders were not authorized.

From the foregoing, the only conclusion to be drawn from the facts relied upon as proof of an alleged scheme to defraud is unquestionably:

(a) That a scheme to defraud is not made out,

(b) That the petitioner is not shown to have been connected with the operation of the alleged scheme.

(b) Evidence concerning the use of the mails.

It is conceded that the Government is not required to produce eye witnesses to establish mailing or the use of the mails and that this element of the offense may be shown by either direct or circumstantial evidence.

The foregoing concession, however, is circumscribed by the decisions upon the subject which are reviewed and succinctly stated in *Freeman v. U. S.*, (3 Cir.) 20 F. (2) 748, 750, as follows:

> "The evidence need not be direct; that is, it need not be that the defendants were seen mailing the letter; it may be circumstantial, that is, evidence of acts or doings, or business custom of the defendants, from which their act of mailing or their act which caused the letter to be mailed may reasonably and lawfully be inferred. There are many cases of this kind, *United States v. Bebout*, (D. C.) 28 F. 522; *Demolli v. United States*, (C. C. A.) 144 F. 363, 6 L. R. A. (N. S.) 424, 7 Ann. Cas. 121; *Bettman v. United States*, (C. C. A.) 224 F. 819; *Underwood v. United States*, (C. C. A.) 267 F. 412; *Dysart v. United States*, (C. C. A.) 4 F. (2d) 765; *Levinson v. United States*, (C. C. A.) 5 F. (2d) 567; *Baker v. United States*, (C. C. A.) 10 F. (2d) 60; *but in each case there is some act or group of acts on which the fact that the accused mailed the letter or caused it be mailed can be hinged.*" (Emphasis ours.)

In this case no witness receiving the invoices through the mail was produced who was acquainted with the petitioner or for that matter, had ever heard of him.

The invoices, while bearing the legend "A & L Advertising Agency" and one of the six telephone numbers assigned to that agency, did not list the office address registered by petitioner but carried instead the street address of the building.

No evidence was produced that these invoices were ever used by anyone at the registered office of the A & L Advertising Agency.

Petitioner was not shown to have ordered or possessed such invoices.

The invoices were not signed by petitioner nor did they bear his name.

No proof was offered or adduced showing the custom or practice of handling mail at the office of the A & L Advertising Agency or of petitioner's knowledge thereof or connection therewith.

Even the bank account of the A & L Agency was not subject to control or domination of petitioner.

The sole proof as to the use of the mails or the causing of their use must rest upon the claim of the several witnesses that invoices were received through the mails.

No direct proof of any kind was offered as to petitioner's causing the mails to be used, and from the proofs which the Government designates as circumstantial evidence of the causing of the use of the mails, it must be conceded that they wholly fail to show any connection between the mailing of the invoices either by petitioner or by any person whatsoever at his direction.

(c) Analysis of evidence of scheme and mailing together.

The petitioner registered as doing business as the A & L Advertising Agency and the Daily Ad News. He originally rented the office occupied by these businesses. Telephones were authorized in his name. On one occasion, he ordered the printing of several hundred copies of the Daily Ad News. He gave his wife complete control of the bank account of the A & L Agency. From some source, several persons received statements or invoices for advertising which bore in part one of the assumed names and address of the same. That is all the Government has established.

The decisions from the majority of the Courts of Appeals in passing upon the rules to be applied in determining what constitutes sufficient proof of the use of the mails in a manner forbidden by the statute here in question, where direct proof thereof is lacking, have consistently laid down substantially this general rule:

When circumstantial evidence alone is relied upon, to prove the causing of the use of the mails, it must be such as will establish either the defendant's participation in the acts themselves or be of such a nature as will support that inference. *Whealton v. U. S.*, (3 Cir.) 113 F. (2) 710; *Rosenberg v. U. S.*, (10 Cir.) 120 F. (2) 935; *Estep v. U. S.*, (10 Cir.) 140 F. (2) 40; *Barrett v. U. S.*, (8 Cir.) 33 F. (2) 115; *U. S. v. Baker*, (2 Cir.) 50 F. (2) 122; and *Brady v. U. S.*, (8 Cir.) 24 F. (2) 399.

A further analysis of the individual cases establishes more specific tests, or rules, which such evidence (circumstantial) must pass or possess before being capable of supporting an inference strong enough to amount to proof of a substantive fact required by the statute to be proven or established.

A letter with an incoming mail stamp thereon establishes only that when a letter was received through the mails in the ordinary course of business, it was so stamped. From this it cannot be concluded that every letter so stamped came through the mail and that this one did. *U. S. v. Baker, supra.*

Because a letter purports to have traveled from another town is not proof that it was mailed by the defendant. *Rosenberg v. U. S., supra.*

The inclosure of a copy of a letter in an envelope with another, reciting that the original was sent to another town, at which it was received, does not permit the predication of an inference upon inference to supply the proof required by the statute. *Rosenberg v. U. S., supra.*

Receipt of a letter bearing the signature of a defendant is insufficient to sustain an inference that he mailed or caused the mailing of the letter. *Freeman v. U. S.; U. S. v. Baker;* and *Brady v. U. S., supra.*

Receipt of a letter bearing the letterhead of the defendant, with his signature thereon, and indicating it was in reply to previous correspondence, is insufficient to overcome the rule against pyramiding inferences. *Whealton v. U. S., supra.*

Proof of the custom or practice of the handling of mail at an office together with proof that a person was dominant in handling the affairs of such office, will support an inference that the mails were used.

From the foregoing it may be deduced that the manner and *quantum* of proofs referred to in the general rule aforestated which will either establish the defendant's participation in the act of mailing or support an infer-

ence to that effect are not made out or established by showing either (a) that a letter was received through the mails, or (b) that it traveled from one town to another, or (c) that the letter is on his letterhead and bears the signature of the defendant, and indicates by the content to be in reply to another letter or (d) the custom and practice of handling mail, without at the same time showing that the person sought to be charged was dominant in the affairs of that office.

The only proof as to the use of the mails was testimony of the receipt by various persons of invoices for advertising upon stationery bearing the legend "A & L Advertising Agency."

It was not shown that the invoices were ever used by anyone at the office of the Agency nor that petitioner ordered or possessed them. They were not signed by him. There was no evidence concerning the custom and practice of mailing at the office, and none from which it could be inferred that petitioner caused the use of the mails.

Under the authority of the above cases, it is clear that the evidence does not sustain the conviction.

Where circumstantial evidence is relied upon to prove the use of the mails, it must establish the defendant's participation in the act of mailing or support an inference to that effect. *Whealton v. U. S.*, and *Rosenberg v. U. S., supra.*

In the courts below, the Government in answer to some of the authorities hereinbefore cited took the position that the rules enunciated in those cases were peculiar to those circuits, and relied upon *Finnegan v. U. S.*, 231 Fed. 566; *Levinson v. U. S.*, 5 Fed. (2), 568; *Krotkiewicz v. U. S.*, 19 F. (2), 421 and *McIntyre v. U. S.*, 49 Fed. (2), 769, all

decided in the Sixth Circuit, and certain cases from the Seventh and Ninth Circuits.

In *Finnegan v. U. S., supra,* there was no question but what the defendant had personally contacted the person charged to be defrauded; had personally made representations which were admittedly untrue and had personally requested the person to be defrauded to use the United States mail in making remittance to him, the defendant. Likewise, the evidence was undisputed that the person transmitting the letter to the defendant had personally prepared and caused the letter to be deposited in the United States mail and its contents were personally received by the defendant the following day. Obviously, this case does not even remotely resemble the instant case.

In *Levinson v. U. S., supra,* the established facts are impossible of comparison with the facts of the present case. In that case, the defendant had admittedly prepared the financial statement that was false and fraudulent. The proof showed further that he not only had organized the company, but was thereafter active throughout its brief existence, dominated its affairs and carried on all of its correspondence, and exercised such further control that precluded others from purchases, or contracting indebtedness, and the letters involved, although denied by the defendant, were letters that fell within that phase of the company's business involving the purchase of goods and the contracting of indebtedness. There the Government not only proved custom and practice, but backed up and fortified the circumstantial proof by establishing that no one but the defendant involved could have authorized or caused the mailing of the letters. These facts present a vastly different picture than that established by the proven facts in the instant case.

In *Krotkiewicz v. U. S., supra,* the defendant was the president of the Polonia Department Store and had been for 26 years. The fraud involved the submission of a false financial statement which admittedly bore the signature of the defendant. The falsity of the statement laid in the fact that it represented that the corporation was the owner of real estate of the value of $41,100.00. Whereas, on the same date the statement was prepared, the defendant had personally arranged the sale of that real estate at a figure far less than that shown on the statement. The record further showed that not only was the defendant the president, he was the manager and the chief stockholder, and he admitted that he ran the business of the Polonia Department Store.

In *McIntyre v. U. S., supra,* the precise question here involved was not raised. The opinion is brief. However, it does appear that unquestionably it was established that the letters were received by mail; that they were dated at Cleveland, which was the place of business of the company, and that the defendant was conducting the correspondence. Here again a most important element lacking in the instant case was established, e.g., that the defendant was the person conducting the correspondence.

A like analysis of cases from the Seventh and Ninth Circuits will reveal that in every instance there were facts directly connecting the defendants to the acts of mailing; or at least furnishing a logical basis for an inference to that effect.

Petitioner contends that no case has affirmed a conviction where the proofs on the essential elements of the offense were so lacking as here.

If, however, the circuits differ in their approach to the problem of analysis of the evidence and in their con-

clusion as to necessary types and degree of proof required to sustain a conviction, then that conflict should be resolved by this Court.

Assigned Error Number 2

The conviction is founded upon pyramided inferences, none of which the facts support.

Petitioner registered as intending to do business under the assumed names of the A & L Advertising Agency and the Daily Ad News (R. 4); an office was rented (R. 5); telephones were installed (R. 7); and bank accounts were opened (R. 12). From these facts, it may be fairly inferred that he intended either to enter into and operate the business or to set up others in business.

Certain business firms received statements for advertising which they denied requesting, but in several instances paid, because of uncertainty as to the accuracy of their recollections (R. 25 and 39). The checks issued in payment bore the unidentified stamp of the A & L Advertising Agency (R. 25 and 37). These facts might justify an inference that someone connected with the A & L Advertising Agency office had sent or caused the invoices to be sent out.

It is possible to draw two inferences from those facts, i.e., that petitioner had either gone into business himself or opened an advertising business for others, and that thereafter someone connected with the A & L Advertising Agency had caused invoices to be mailed requesting payment for advertising that was not authorized.

To justify the first inference, that petitioner conducted the advertising business, requires overlooking entirely the fact that no bit of proof whotsoever connects petitioner with the solicitation of advertising, and that the entire

record is barren of one single statement, word, or even a suggestion that petitioner knew or should have known that any of the four firms named as addressees in the indictment had never ordered advertising. Further, to sustain the inference requires ignoring completely that although the mail carrier called at the office of the A & L Advertising Agency four times daily during the time that the offices at 911 Lawyer's Building was occupied, he never once saw petitioner (R. 44). On the contrary, he always saw another man in the office and most of the time Mrs. Loretta Abraham. We must ignore too the proofs of petitioner's presence in Cleveland, Ohio during the period in which these letters were mailed, as attested by the Government's exhibits, the telephone slips (R. 9, 10).

As to the second inference, no attempt whatsoever was made by the Government to connect petitioner with causing the use of the mails, even to the extent of attempting to show the custom and practice of the A & L Advertising Agency with respect to mailing or in lieu thereof, showing such proof was not available.

Making these inferences sufficiently broad to support the claim in the indictment that petitioner was a party to a scheme to defraud, requires ignoring completely the proofs to the contrary, just enumerated, and, in addition thereto to infer:

(a) That petitioner must have operated this business, which assumption is dependent on another, e.g., that his purpose was fraudulent, and

(b) Predicate thereupon a second inference, that having operated the business he must have known that no valid orders for advertising had ever been received from the firms named in the indictment, and thereafter indulge in a still further presumption or inference that

(c) He had either personally mailed the disputed invoices or caused the mails to be used to send out the invoices, or

(d) That he so dominated and controlled the efforts of the others that he, in effect, caused the mailing if it was done by others.

The rule forbidding predication of inferences upon inferences was long ago announced by this Court in *U. S. v. Ross*, 92 U. S. 281.

As has been hereinbefore pointed out, the testimony may possibly support two legitimate inferences but to prevail in the proofs necessary to sustain the charge as laid in the indictment, requires the predication of at least two additional other inferences upon inferences already drawn.

Several authorities upon analogous facts support the reasoning hereinbefore presented. One of these, *Levinson v. U. S., supra,* (the decision relied upon most strongly by the Government in the courts below), is distinguished upon the same grounds herein urged, in *Whealton v. U. S., supra.* Whealton was the president of Whealton Co., Inc. and the company had participated in a fraudulent issue of oil royalty certificates; one Levy had purchased from the brother of Whealton some of these certificates; thereafter Levy had received from Whealton Co. a letter containing a report on those particular series certificates; and the letter of transmittal bore as a signature the name of Whealton but whether it was his actual signature was disputed. Upon these facts, the court said, page 714:

> "In an effort to supply circumstances which would support an inference that Whealton had mailed the letter to Levy, the government offered proof to show the practice or custom in the office

of the Whealton Company with respect to mailing letters originating therein and that Whealton was dominant in the direction of the affairs of the company. The government contends that these facts, together with the fact that the letter was on the letterhead of the Whealton Company, that the letterhead showed Philadelphia as the company's place of business, and that the exhibit itself indicated that it was in response to a letter then recently received by Whealton from Levy, justified an inference that Whealton had mailed the letter or caused it to be mailed. But, the proofs offered to show the practice or custom of the office with respect to mailing outgoing letters fell far short of proving any custom, and the attempt was finally abandoned by the government. Moreover, the remaining facts relied upon by the government do not preclude the necessity of drawing an essential inference from other inferences, which is not permissible. *Brady v. U. S., supra; U. S. v. Ross, supra.* In the case of *Levinson v. U. S.*, (6 Cir.), 5 F. (2), 567, 569, cited by the government, it was not only shown that the one charged with having mailed the letter was dominant in the affairs of the company but that he 'carried on all of its correspondence.' The proofs did not so disclose in the instant case. In *Greenbaum v. U. S.*, (9 Cir.) 80 F. (2) 113, it was said, at page 125, that: 'A signature of an employee plus the company's letterhead, together with proof that the letter was mailed by some one, is sufficient in this respect,' that is, as to the evidence necessary to show 'a mailing of the indictment letter by the defendants or their agents to warrant consideration by the jury.' Here there was no evidence of the mailing of Exhibit G-408 by anyone nor were circumstances directly proven from which such an inference might be drawn. We are therefore of the opinion that the evidence in the record is insufficient to support a finding of the mailing of the letter (Ex. G-408) and that the defendant Whealton's conviction on count 13 of the indictment cannot be sustained."

And again in *Rosenberg v. U. S., supra,* there was a situation analogous to the present circumstances. Rosenberg and one Uphoff had engaged in an oil lease fraud. Uphoff sold certain oil leases to one Harber in Streater, Illinois. Thereafter, Uphoff and Rosenberg, pretending to be strangers induced Harber to advance $1,800.00 toward drilling a well. Harber received from Uphoff a letter containing a copy of a letter to the Commissioner of Public Lands requesting that the assignment of an oil and gas lease be recorded. The indictment letter was charged to be the original mailed to the Commissioner. The facts disclosed that the lease was received and recorded. There was no proof of the mailing of the letter or the lease by anyone to the Commissioner.

In reversing and remanding this case, the court said, page 937:

> "The crime charged in the indictment has its genesis in the scheme to defraud, but the very gist and crux of the offense is the use of the mails in furtherance of the scheme. It is the use of the mails for that purpose which vests a federal court with jurisdiction of the offense. Direct proof that the letter or other matter described in the indictment in a case of this kind was transmitted through the mails is not necessary. That fact, like many others, may be established by circumstantial evidence. *Freeman v. U. S.*, (3 Cir.), 20 F. (2) 748; • • • *But an inference of fact which is essential to the establishment of the offense cannot be rested upon another inference. Conviction cannot be predicated upon one inference pyramided upon another. Presumption cannot be superimposed upon presumption and thus reach the ultimate conclusion of guilt. U. S. v. Ross,* 92 U. S. 281, 23 L. Ed. 707; *Vernon v. U. S.*, (8 Cir.), 146 Fed. 121; *Brady v. U. S., supra; Mackett v. U. S., supra.*" (Emphasis ours.)

Similar facts and a like ruling are also to be found in *Brady v. U. S., supra.*

To the same effect are *U. S. v. Russo,* (3 Cir.) 123 F. (2) 420; *Mackett v. U. S.,* (7 Cir.) 90 F. (2) 462; and *Gargotta v. U. S.,* (8 Cir.) 77 F. (2d) 977.

The conviction is based upon the combination of two series of dependent inferences, one regarding the scheme to defraud, and one concerning the use of the mails. The facts sustain none of the individual inferences, and the drawing of inferences from inferences violates the rule of *U. S. v. Ross, supra,* and that of the majority of Courts of Appeals.

It appears that there is a conflict in the application of the rule between the Courts of the Second, Third, Eighth and Tenth Circuits and those of the Sixth, Seventh and Ninth Circuits.

CONCLUSION AND PRAYER

The decision of the court below conflicts with decisions of other Courts of Appeals on the matters of the manner and degree of proof required for a conviction under the statute, and regarding the drawing of inferences from circumstantial evidence. The conflict should be resolved by this Court.

The matters of degree of proof and drawing of inferences from circumstantial evidence are important questions of federal law which have not been, but should be, settled by this Court.

The practice here of predicating inferences upon inferences drawn from circumstantial evidence is in conflict with applicable decisions of this Court.

The resolution of those conflicts, and the enunciation of the required degree of proof to sustain a conviction under Title 18, United States Code, section 338 (now Title 18, United States Code, section 1341), using the mails to promote frauds, is of vital importance to the proper administration of federal criminal procedure.

Therefore, a writ of certiorari should issue as prayed.

Respectfully submitted,

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